W. E. WICKS

IBLA 74-135 Decided February 21, 1974

Appeal from decision (I 7075) of Idaho State Office, Bureau of Land Management, declaring mining claim null and void.

Affirmed as modified and remanded.

Mining Claims: Generally--Mining Claims: Determination of Validity

> The Department of the Interior is vested with the authority to determine the validity of mining claims on federal lands. A federal court determination is not required.

Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Hearings

> A mining claim located on land at a time when the land is withdrawn from mining location is declared properly to be null and void ab initio, where the records of the Department reflect such withdrawal. No opportunity for a hearing is required in those circumstances.

Mining Claims: Location--Mining Claims: Possessory Right

> Under 30 U.S.C. § 38 (1970), when a person (and his predecessors in chain of title) has held and worked a mining claim for a period of time, equal to that prescribed by the state statute of limitations for adverse possession to mining claims, during which period the land was open to mining location, he is deemed to have made a location. Whether the location is valid depends on whether a discovery has been made within the meaning of the mining laws.

Administrative Practice: Generally--Mining Claims: Determination of Validity--Mining Claims: Withdrawn Land

> Where a mining claim is declared null and void ab initio because the claim was located at a time when the land was withdrawn therefrom, and it appears that the claim was held when the land was open to such entry, for a period equal to that prescribed by the state statute of limitations for adverse possession of mining claims, the claimant may have complied with 30 U.S.C. § 38 (1970), and the decision declaring the claim null and void ab initio properly is set aside.

APPEARANCES: W. E. Wicks, pro se.

OPINION BY MR. FISHMAN

W. E. Wicks has appealed from a decision of the Idaho State Office, Bureau of Land Management, dated October 18, 1973, which declared the White House placer mining claim null and void. The mining claim was located on September 13, 1954, and was conveyed by the locator through mesne conveyances to appellant on July 10, 1959. The land in issue, embracing the mining claim, is within Powersite Reserve No. 8, dated July 2, 1910. The decision appealed from adverted to the Mining Claims Restoration Act of August 11, 1955, as amended, 30 U.S.C. §§ 621-25 (1970), and stated that at the time of the location the land was withdrawn from mining locations. The decision pointed out that the 1955 Act did not resuscitate claims located on powersite lands prior to its enactment, citing Day Mines, 65 I.D. 145 (1958). The decision also indicated that, by reason of various withdrawals, the land was open to location only from August 11, 1955, to August 22, 1960, and from February 5, 1964, to October 2, 1968.

Appellant does not question the factual basis of the decision below but asserts:

> The White House Placer Claim is a valid mining claim by law and the only way it can be taken away from me is by "law" in a Federal Court of the United States of America.

Thus appellant is asserting that the Department of the Interior is without jurisdiction to declare a mining claim null and void.

In Cameron v. United States, 252 U.S. 450, 459-61 (1920), the Court stated:

> The second objection rests on the naked proposition that the Secretary was without power to determine whether the asserted lode claim, under which Cameron was occupying and using a part of the reserves to the exclusion of the public and the reserve officers, was a valid claim. * * * In our opinion the proposition is not tenable.
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> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stats., §§ 441, 453, 2478; * * * United States v. Schurz, 102 U.S. 378, 395; * * * Lee v. Johnson, 116 U.S. 48, 52; * * * Knight v. United States Land Association, 142 U.S. 161, 177, 181; * * * Riverside Oil Co. v. Hitchcock, 190 U.S. 316, * * *.
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> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.
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> True, the mineral land law does not in itself confer such authority on the Land Department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the Land Department. This is a necessary conclusion from this court's decisions. * * *

In Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963), where the United States initiated condemnation proceedings in a federal district court and requested that the validity of the mining claims be determined administratively by this Department, the Supreme Court of the United States agreed that the request was to be granted, quoting, at 336-38, Cameron, supra. See Ed Wuilliez,

12 IBLA 265 (1973); United States v. Martin, 9 IBLA 236 (1973); United States v. Ideal Cement Co., Inc., 5 IBLA 235, 79 I.D. 117 (1972). The foregoing is dispositive of appellant's contention.

The Department has found other claims void ab initio by reason of having been located on lands which at the time were withdrawn from mining location for power purposes. Ralph Page, 8 IBLA 435 (1972); Gardner C. McFarland, 8 IBLA 56 (1972). No hearing is required to declare a mining claim null and void ab initio where the records of the Department show that at the time of location of the claim the land was not open to such location. Ramsher Mining and Engineering Co., Inc., 7 IBLA 172 (1972); M. A. McHenry, 7 IBLA 77 (1972); Ralph Page, supra. It follows that the mining location, made September 13, 1954, was held properly to be null and void.

As we have indicated earlier, appellant and his predecessors in interest may have held the claims during the period of August 11, 1955, to August 22, 1960, when the land was open to mining location, a period of more than five years.

Under 30 U.S.C. § 38 (1970), a person who has held and worked his mining claim for a period of time equal to the time prescribed by the statute of limitations for mining claims of the state where the claim is situated, during which time of holding the land was open to mining location, is deemed to have made a location. See Gardner C. McFarland, 8 IBLA 56 (1972); Merrit N. Barton, 6 IBLA 293, 79 I.D. 431 (1972). In essence, holding and working a mining claim in open, notorious, adverse possession, for the period of time required to establish adverse possession of a mining claim while the land is open to mining location, generally is regarded as tantamount to a new location or relocation, dispensing with proof of valid notices. See Judson v. Herrington, 71 Cal. App. 2d 565, 162 P.2d 931 (1945). We now turn to consideration of the Idaho statute of limitations.

Section 5-203 of the Idaho Code provides:

> 5-203 Action to recover realty.--No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within five years before the commencement of the action, and this section includes possessory rights to lands and mining claims.

Uninterrupted and continuous possession for the prescriptive period raises the presumption that it was adverse and under claim of right.

Bachman v. Reynolds Irr. Dist., 56 Idaho 507, 55 P.2d 1314 (1936); Northwestern & Pac. Hypotheekbank v. Hobson, 59 Idaho 119, 80 P.2d 793 (1938).

Open, notorious, adverse possession of an unpatented mining claim for a period of more than five years is a bar to an action to recover possession of the same, and thus constitutes a location. See Bradley v. Johnson, 11 Idaho 689, 83 P. 927 (1906). However, 30 U.S.C. § 38 (1970) does not obviate the making of a discovery of a valuable mineral in order to establish a valid claim and a right to patent. Cole v. Ralph, 252 U.S. 286, 307 (1920); Merrit N. Barton, supra; see Harry A. Schultz, 61 I.D. 259, 263 (1953).

The record does not reveal the facts, upon which a determination may be predicated, showing whether appellant established a possessory interest in the mining claim under 30 U.S.C. § 38 (1970). The Idaho State Office should investigate to determine whether the elements necessary for compliance therewith, as well as the discovery requirement have been met, and take appropriate action in the light of its investigation.

On the basis of the record before us, we cannot determine whether appellant has satisfied the requirements of 30 U.S.C. § 38 (1970) and the cited Idaho statute.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified and remanded.

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Frederick Fishman, Member

We concur:

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Joseph W. Goss, Member

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Joan B. Thompson, Member